

## **When Torture Becomes Science**

Bloche, Gregg M., New York Times, 12 August 2017

Was the Central Intelligence Agency's post-9/11 "enhanced interrogation" program an instance of human experimentation?

Recently declassified documents raise this explosive question. The documents were obtained by the American Civil Liberties Union in connection with a federal lawsuit scheduled for trial next month. The case was brought on behalf of three former detainees against two psychologists who developed the C.I.A.'s program. I reviewed some of the documents in a recent article in *The Texas Law Review*.

Internal C.I.A. records indicate that the psychologists, James Mitchell and John Bruce Jessen, anticipated objections that critics would later level against the program, such as that coercion might generate unreliable information, and contracted with the agency to design research tools that addressed some of these concerns. Redactions in the released documents (and the C.I.A.'s withholding of others) make it impossible to know the full extent, if any, of the agency's data collection efforts or the findings they yielded. At their depositions for the A.C.L.U. lawsuit, each of the psychologists denied having evaluated the program's effectiveness. But the C.I.A. paid the psychologists to develop a research methodology and instructed physicians and other medical staff members at clandestine detention sites to monitor and chart the health conditions of detainees.

In response, the advocacy group Physicians for Human Rights has charged that the program was an unlawful experiment on human beings. It calls the program "one of the gravest breaches of medical ethics by United States health professionals since the Nuremberg Code," the ethical principles written to protect people from human experimentation after World War II. In its lawsuit, the A.C.L.U. is pressing a similar claim.

These claims are a bit of a reach. In a true experimental study, the C.I.A. would have had to test its interrogation strategy against one or more standard interrogation methods, using experimental and control groups of captives. There's no evidence the agency did this. (In 2010, the C.I.A. denied it conducted "human subject research on any detainee or group of detainees.")

To some degree, the documents suggest, the two psychologists resisted pressure within the C.I.A. for rigorous assessment of the program's efficacy. They argued that interrogation strategies can't be standardized and therefore can't be compared, like medical treatments, in randomized, prospective fashion.

But backers of more systematic assessment seem to have won out. In an undated document, the C.I.A.'s chief of medical services chided Dr. Mitchell and Dr. Jessen for treating the torture program as an "art form" that "could not be objectively analyzed," then pressed the "need to look more objectively for the least intrusive way to gain cooperation."

Is this the stuff of Josef Mengele, the doctor who conducted gruesome experiments on captives at Auschwitz? Or would it be more correct to conclude that the C.I.A. could lawfully collect and review evidence bearing on the interrogation program's efficacy and safety?

Transnational law backs the agency. The International Covenant on Civil and Political Rights bans "medical or scientific experimentation" without consent but doesn't restrict human-subjects research more generally. The Geneva Conventions say something similar. No one, though, is claiming that C.I.A. review efforts involved experimental and control groups and so were "experimentation" as science defines it.

But should we treat the program as an "experiment" in a more colloquial sense, as Physicians for Human Rights and the A.C.L.U. seem to do? Here, the agency has common sense on its side. If assessing outcomes of public programs makes them "experiments," then all government action that affects people (welfare programs, Medicaid, etc.) is human experimentation, triggering informed-consent and various other legal requirements.

This logic surely sweeps too far. Our real concern about what Dr. Mitchell and Dr. Jessen did or didn't do isn't human experimentation; it's torture. Collection of data from victims is morally incidental.

United States law poses more of a problem for the two psychologists and the C.I.A. Federal regulation extends human-subjects protection beyond "experiments" to other "research," defined sweepingly since 1991 — under the so-called Common Rule (which is binding on most federal agencies) — as "systematic investigation" that is "designed to develop or contribute to generalizable knowledge."

It's difficult not to conclude that a collection of information by the C.I.A. about its interrogation program would constitute "systematic investigation" in pursuit of "generalizable knowledge." But here again, common sense pushes back. Evaluations of myriad public programs that affect people pursue "generalizable knowledge," yet we don't treat all these people as research subjects covered by the Common Rule.

Given that, in the words of President Barack Obama, "we tortured some folks," isn't it better to have learned something about the toll on bodies and minds? And might it be useful to have gleaned something about the technique's intelligence-gathering efficacy — or lack thereof? We look to science to shed light on so many matters of public import, from educational policy to environmental hazards. Is torture somehow different?

Here's why it may be. Observational study of most public policy isn't done to fashion ways to harm people. This isn't true of torture. Concern about hurting vulnerable people is the animating idea behind human-subjects regulation — and behind judgments about who is and isn't a research subject.

Prohibiting data collection as an adjunct to torture makes it harder for perpetrators to hone their technique. It stands in the way of efforts to make torture, like some medical procedure, "safe and effective." And it keeps apologists from rationalizing that abuse is acceptable since researchers are making improvements.

Observational studies of the torturer's craft victimize people by legitimizing it. And they put future captives at greater risk for becoming victims.